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Disaggregating LWOP: Life Without Parole, Capital Punishment, and Mass Incarceration in Florida, 1972–1995

Christopher Seeds

Over the past 40 years, life imprisonment without the possibility of parole (LWOP) has been transformed from a rare sanction and marginal practice of last resort into a routine punishment in the United States. Two general theses—one depicting LWOP as a direct outgrowth of death penalty abolition; another collapsing LWOP into the tough-on-crime sentencing policy of the mass incarceration era—serve as working explanations for this phenomenon. In the absence of in-depth studies, however, there has been little evidence for carefully evaluating these narratives. This article provides a state-level historical analytic account of LWOP's rise by looking to Florida—the state that uses LWOP more than any other—to explicate LWOP's specific processes and forms. Recounting LWOP's history in a series of critical junctures, the article identifies a different stimulus, showing how LWOP precipitated as Florida translated major structural upheavals that broke open traditional ways of doing and thinking about punishment. In doing so, the article reveals LWOP to be a multilayered product of incremental change, of many, sometimes disjointed and indirectly conversant, pieces. Presenting LWOP as the product of a variety of penal logics, including those prioritizing fairness and efficiency, the article more generally illustrates how very severe punishments can arise from reforms without primarily punitive purposes and in ways that were not necessarily planned.

Since the early 1970s, life imprisonment without the possibility of parole (LWOP)—a prison sentence under which a person convicted of a criminal offense is ineligible for administrative release during their natural life—has emerged as a regular penal practice in the United States. So much so that the sanction not long ago was labeled "America's new death penalty" (Ogletree and Sarat 2012) and its practice said to "define. . .the logic of contemporary penality" (Simon 2012: 282). The growth of LWOP since the 1970s is

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remarkable both for the appearance of a new routine penal form and for the apparent nonchalance (see Girling 2016) with which the American public and penal state actors of all types have allowed a practice that other developed nations consider morally reprehensible (Van Zyl Smit 2014) to find safe harbor.

Yet although LWOP is now a normal part of contemporary American penal practice, even engrained in the cultural imagination, just how this came to pass has not been articulated carefully or explained. Particularly lacking is knowledge of the specific circumstances and processes from which LWOP emerged. What "everyone knows" about LWOP can be captured in two sweeping claims. First, that invalidation of existing capital punishment statutes by the United States Supreme Court in *Furman v. Georgia* (1972) and abolition efforts by anti-death-penalty activists and litigators catalyzed LWOP as an alternative form of ultimate penalty (Harvard Law Review 2006; Steiker and Steiker 2014). Second, that where laws calling for LWOP arose outside the capital context they did so in response to high crime rates and social unrest amidst a flow of tough-on-crime sentencing policy, including three-strikes and truth-in-sentencing laws. By the former view, LWOP is a fixture of capital sentencing. By the latter view, LWOP is representative (Tonry 2016), if not exemplary (Simon 2014), of the policy that produced mass incarceration. Each of the narratives (which are not mutually exclusive) claims for LWOP a different primary driver: the dynamics of capital punishment politics on the one hand, reactionary tough-on-crime policy on the other.

Both accounts are plausible, and both find some grounding in the slight information we have about LWOP's history (see Harvard Law Review 2006; Rowan and Kane 1991–92; Stewart and Lieberman 1982; Wright 1990). Neither account, however, has been explored in detail. As scholars of punishment increasingly emphasize, "[a]stonishingly little research has been done on the sentence of life without the possibility of parole" (Tonry 2016: 46), and the "causes of the proliferation of LWOP and its remedy deserve far more attention from legal scholars and social scientists than they have received" (Zimring and Johnson 2012: 747). Particularly needed are studies of "when, why and how individual states came to enact LWOP statutes" and of the "direct catalysts … located in regional, state, and local conditions" (Gottschalk 2012: 260–61, quoting Lynch 2011).

This article uses an in-depth state-level history of LWOP to question and complicate the conventional wisdom. In recent years, a "second generation" of sociology of punishment scholarship has turned from national to state and local-level historical inquiry to explain penal change (Campbell 2012). In uncovering state-level arrangements and conjunctures that work has prompted revision

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of taken for granted claims and assumptions about how laws and penal practices develop. One might say the state-level studies (e.g., Campbell 2012; Lynch 2010; Schoenfeld 2014) are in the practice of problematizing standard narratives. This paper brings that sort of detailed historical analytic lens to bear on the emergence of LWOP.

I reconsider the stories we take for granted by beginning at the beginning: an archival inspection of LWOP as it came about in the state that was first to reenact capital punishment after *Furman* and which currently holds more LWOP prisoners than any other: Florida (Nellis 2017; see Radelet and Vandiver 1983). The conditions and events that led to more than 8000 people serving LWOP sentences in the Sunshine State (Nellis 2017) offer a window into understanding LWOP at its most virulent. Florida is also significant because it implicates archetypes with a powerful hold in current thinking on American punishment. This includes those noted above, claiming death penalty abolition and tough-on-crime policy, respectively, as the primary drivers of LWOP. It also includes another archetype upon which much recent penal state scholarship rests: a story of regional similarity, presenting the American South (or Sunbelt) as a particular kind of "penal place" where shared experiences of racial oppression and slavery, decentralized government, and fiscal conservatism buttress a pro-death penalty alignment, a punitive approach to corrections, and a fertile base for harsh sentencing policy (Campbell 2011, 2012; Lynch 2010; Perkinson 2010; Schoenfeld 2014). In discussions of Southern penality, as in talk of the death penalty and mass incarceration, Florida is exemplary.

Given that Florida is a climate in which punitive penal practices are institutionally and culturally entrenched and mass incarceration has flourished, one might expect LWOP to emerge there with particular and pace-setting intensity. Further, because in Florida the death penalty has been especially prized (see Von Drehle 1988), one might expect LWOP to come on there with special force after *Furman*. At a glance, then, Florida's leadership in LWOP sentencing today seems what one would expect, an understandable result of death penalty abolition dynamics and the punitive turn working together.

Yet however aptly the conventional narratives describe the manner in which LWOP operates at present, they do not adequately explain its emergence. These two principles—LWOP as an alternative to the death penalty and LWOP as an intentional tool for the harshest of punishment—leave out an important element of LWOP's character. In doing so, they also neglect important lessons that LWOP has to teach about penal development and studying penal change.

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Rather than death penalty abolition or punitive politics driving LWOP, Florida's history shows that LWOP emerged in significant part from the state's attempts to deal with two major structural upheavals that broke open traditional ways of doing and thinking about punishment. The first of these was the transition from the pre-*Furman* era of capital punishment to a modern mode in which the death penalty is narrowed in scope and painstakingly regulated by constitutional law. The second was the transition away from an indeterminate sentencing paradigm. These transformations involved big shocks to state criminal justice systems, disrupting long-standing penal philosophies and practices and releasing tensions in the process that the old systems once held in check. When the shocks were translated through local penal structures and politics, the changes made to law and practice precipitated LWOP.

The result was not always immediate. For example, Florida did not adopt LWOP in response to *Furman* and did not adopt LWOP as the death penalty alternative for more than two decades. Many events outside the capital arena built LWOP in the interim—most significant, the abolition of parole for all noncapital crimes in the early 1980s. When Florida eventually turned to LWOP as the death penalty alternative in the 1990s, legislators were reacting to the uneven treatment that previous changes wrought between noncapital and capital life sentencing. In short, the state's early responses set foundations that would later interact with high profile events, tough-on-crime policy, and death penalty politics to make LWOP what it is in Florida today. LWOP emerged from debates, decisions, and enactments in response to major penal transitions and then proliferated as the state attempted to manage that law.

Pointing to these upheavals as the key source of LWOP spotlights an important and under-recognized factor in LWOP history, one the prevailing narratives do not address. It also paints LWOP in a new light: as a particularly severe punishment that has arisen in significant part from reforms that do not have a primarily punitive purpose. When legislators today implement LWOP, they frequently do so with awareness and intent. The standard narratives similarly treat LWOP as something that came ready-made after *Furman*, which lawmakers simply picked up and put to use. Yet Florida's expansive use of LWOP rests upon a base that developed before the concept of LWOP was fully formed and before its utility as a political tool was fully realized. Recognizing the state's efforts to restructure punishment in response to paradigm shifts as the critical spur of LWOP's development does not mean we reject the conventional wisdom, but we must reorient it. In Florida, the state's efforts to restructure punishment in response to paradigm shifts set the course for LWOP's rise.

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In what follows, I begin by articulating the standard narratives. I then turn to a historical analysis of the emergence of LWOP as a sanction and practice in Florida. I take as bookends for the history 1972, the year in which the United States Supreme Court invalidated state capital punishment schemes, and 1995, the year when Florida eventually authorized LWOP as the alternative sanction for all capital offenses. Focusing on the 1972–1995 period allows me to contrast and relate LWOP's delayed development in the realm of capital punishment with its growth in other areas. It also allows me to relate those changes with Florida's tough-on-crime policy, which begins in the late 1980s and early 1990s. I present the history as a series of critical junctures, each of which is fitted with certain processes that produced LWOP in various forms. This uncovers a path of incremental change that is local in nature, but consists of an assortment of processes and forms that may be extrapolated to other states.

Problematizing Standard Narratives

State-Level Study in the Sociology of Punishment

For decades, influential historical accounts in the sociology of punishment have been pitched at a macro level, privileging broad structural and political theories that analyze punishment on a national scale. These studies of large-scale forces and national politics have been crucial for understanding contemporary penal policy. As scholars note, however, studies of broad social, economic, political, and cultural forces work at a level of abstraction with a particular limit when it comes to studying American criminal justice (Garland 2013; Lynch 2011). Because in the United States the administration of crime and punishment is governed primarily at the state level, broad-level studies are distanced from proximate causes: large-scale forces only influence law and policy once translated through state and local institutions by state and local actors. As David Garland put it, "We should recognize that the *proximate* causes of changing patterns of punishment lie … in *state and legal* processes: chiefly in legislative changes made to sentencing law and in the actions of legal decision makers" (2013: 10, emphasis in original). State-level studies therefore provide a necessary complement to macro-level work: while they speak definitively only to happenings in a particular locale, they illuminate general knowledge and understanding of penal phenomena, and encourage thinking about penal change with greater complexity.

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Recent state and local-level scholarship shows, for example, how specific historical institutional and cultural backgrounds give rise to conditions and conceptions that influence what penal actors see as problems and solutions (Campbell 2014; Lynch 2010; Schoenfeld 2010; see Beckett 1997; Downes 1988). It illustrates the manner and extent to which interest groups, from prosecutors and law enforcement (Campbell 2011) and corrections officers (Page 2011) to victims' rights and feminist groups (Gottschalk 2006), alter penal policy. It has helped elicit the role of state political structures (Barker 2009; Schoenfeld 2014), and the synergy between local, state, and federal criminal justice policy and jurisprudence (Campbell and Schoenfeld 2013; Miller 2008; see Campbell et al. 2015). This scholarship has also framed penal change as a product of ongoing and evolving struggles rather than sharp or sudden breaks (Goodman et al. 2014).

To date, however, the greatest effort and success in the penal state genre has been directed toward explaining the overall development of state prison systems and growth of prison populations during the last quarter of the twentieth century—in other words, the "moment of paradigm transformation" known as "mass incarceration" (Lynch 2010: 3; see Gottschalk 2012: 206). With few exceptions (such as Reiter [2016] on solitary confinement), scholars have not turned the same attention to the evolution of specific penal practices or to the emergence of new penal measures.

So it is with LWOP. Limited research exists on the history of LWOP in the United States. Much of the empirical knowledge about LWOP derives from policy reports and efforts to map LWOP's use in and across jurisdictions at a national level (Mauer et al. 2004; Nellis 2013, 2017; Nellis and King 2009; Turner 2013; for jurisdiction-specific surveys, see Blagg et al. 2015; Schmitt and Konfrst 2015; for older attempts, see Cheatwood 1988; Harries and Cheatwood 1997). There are significant scholarly analyses and commentaries on LWOP in social science (e.g., Appleton and Grøver 2007; Gottschalk 2015) and in law (e.g., Ogletree and Sarat 2012; Steiker and Steiker 2014; Van Zyl Smit 2002), and theoretical analyses of LWOP are increasingly common (e.g., Dilts 2015; Dolovich 2012; Girling 2016; Simon 2012). The historical statements in these works, however, are for the most part brief and offered as "background." A handful of publications provide pockets of information about particular laws in particular states at particular times (on Alabama, see Stewart and Lieberman 1982 or Wright 1990; on Pennsylvania, Rowan and Kane 1991–92; on Texas, Harvard Law Review 2006), but there are no thorough studies of any jurisdiction. Even very nuanced

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discussions of LWOP (e.g., Gottschalk 2015; Van Zyl Smit 2002) rely largely upon the same stable of historical information.[1]

The Conventional Wisdom About LWOP

While historical research on LWOP is slight, two narrative accounts of LWOP's upward and outward trajectory since the 1970s have come to the fore. The first of these assigns the context relating to the death penalty the primary role in spurring and shaping LWOP. The *death-penalty-as-driver account* consists of two related claims. The first claim is that when Legal Defense Fund litigation culminated in a United States Supreme Court decision invalidating capital punishment (*Furman v. Georgia* 1972), states responded with a "rush to LWOP as an alternative punishment" (Steiker and Steiker 2014: 205), a "pushback in the form of life-without-parole statutes. . .promoted by prosecutors and enacted by law and order legislators who were fearful of facing a punishment scheme without a capital option" (Harvard Law Review 2006: 1841).[2] From these beginnings in the capital context, LWOP spread outward. The oft-cited case here is Alabama, which passed a new death penalty statute with LWOP in 1975 (Harvard Law Review 2006; see Stewart and Lieberman 1982; Wright 1990).

The second claim is that, after capital punishment was officially reinstated (*Gregg v. Georgia* 1976), "the debate over life without parole flipped. Prosecutors who had wanted life-without-parole statutes in order to keep violent criminals in prison now wanted the specter of parole in order to convince juries to sentence defendants to death" (Harvard Law Review 2006: 1841). Abolitionists simultaneously looked to LWOP in an effort to reduce death sentences (Harvard Law Review 2006: 1841). The prime example here is Texas, where LWOP did not exist in any law until it appeared as an alternative capital sanction in 2005 (Harvard Law Review 2006).

The account has been restated at varying levels of specificity as a means of providing a brief contextual, historical basis en

[1] Several informative accounts of LWOP's development authored or coauthored by prisoners are often overlooked. While not published in peer-reviewed press, they are the hard-earned efforts of hours of research in the prison library informed by years upon years of lived experience. Notable accounts include Yount (2004) on Pennsylvania; Haas and Fillion (2016) on Massachusetts; and Wikberg (1979), Nelson (2009), and other Angola prisoners writing on Louisiana (see also Foster 1988).

[2] The per curiam opinion in *Furman* held that "the imposition and carrying out of the death penalty *in these cases* constitutes cruel and unusual punishment" (408 U.S. 238, 239-40, emphasis added). Shortly afterward, more than 30 states refashioned death penalty statutes. The Court later approved several statutes that heightened procedural protections and narrowed death-eligible crimes (*Gregg v. Georgia* 1976), including Florida's (*Proffitt v. Florida* 1976).

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route to asking other questions, such as whether "the existence of life-without-parole statutes is responsible for the decrease in capital sentences and executions" (Harvard Law Review 2006: 1845; see Steiker and Steiker 2008, 2014). Yet as the claim is recited over time, even the few details provided in the original statement have started to fade. The interview, media, and anecdotal evidence that supported a statement about Alabama and Texas (and possibly one or two other states) has taken on the air of a general, national explanation.

A second narrative account of LWOP characterizes it as an outgrowth of tough-on-crime sentencing policy, a product of American punishment's "punitive turn" (see Tonry 2016). As Ogletree and Sarat (2012: 10) recognize, introducing the first book of essays dedicated to LWOP, "[w]hile a substantial body of scholarship focuses on efforts to explain the late twentieth-century incarceration boom in the United States, little attention has been focused specifically on LWOP. When it is talked about, LWOP is folded into broad theories seeking to explain America's penchant for incarceration." Recently, policy scholars have begun to identify "LWOP laws" as a singular feature of the past 30 years (Spohn 2014; Tonry 2016; see also Simon 2012: 284). Yet collapsing LWOP in punitive policy remains the norm. Michael Tonry couches "LWOP laws" (denoting statutes explicitly calling for the sanction) among other "representative institutions" of mass incarceration (2016: 46), asserting "the large majority of new LWOP laws were enacted during the tough on crime period and are at least in part attributable to the same social and political forces that supported enactment of three-strikes and truth-in-sentencing laws" (2016: 84).

The claim that LWOP is primarily a tough-on-crime feature is plausible and may be quite accurate with respect to its more recent use. Indeed, LWOP's nature, a sentence ending with a prisoner's death, seems to embody the contemporary penal logic that Jonathan Simon (2014) dubs "total incapacitation." As such, the *punitive turn account*, like the death-penalty-as-driver account, captures a prevailing way of thinking about LWOP. Yet in the absence of in-depth study, there has been little basis for carefully evaluating either narrative. The narratives stand nevertheless, in a rather de facto way, as the premier working explanations for LWOP's emergence today.

Method

The following case study seeks to refine understanding of LWOP by using historical analytic methods to examine how

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LWOP emerged in a single key state. It draws upon a broad range of sources, including laws, judicial case decisions, criminal justice statistics, and newspaper articles, but the principal data consist of archival materials from the Florida State Library and Archive, including Governors' papers and legislative documents and audio recordings.

Operationalizing LWOP with greater than usual specificity is significant for researching the Florida history. I use the term "LWOP" to refer to any law or arrangement of laws authorizing life sentences that are not eligible for parole and for which clemency is an unlikely proposition. This comes about in more than one way. In Florida, one finds "life imprisonment without parole" as an explicit sanction for certain crimes. Far more often, however, LWOP manifests as a "life" sentence in a context where parole is abolished and in which life-sentenced prisoners are legally precluded from receiving any type of administrative credit toward release, unless their sentence is first commuted to a term of years, which happens rarely. The best example of this is a 1983 Act that prospectively abolished parole in Florida. As the following sections discuss, this Act had a massive impact on life sentences—in effect transforming them into LWOP. It follows that a comprehensive account of LWOP in Florida must focus on (1) laws that directly address LWOP as well as on (2) laws that indirectly bring it about. Also critical is a general understanding of (3) penal policies with implications for discussions about life sentencing. Simply seeking information on laws that explicitly call for "life imprisonment without parole" (which is what commentators generally have in mind when they mention "LWOP laws") would miss the dynamic relations between penal state actors and structures that have generated most of Florida's LWOP laws and sentences.

I approached the research accordingly along two lines. First, to obtain a general frame of reference, I worked from Governors' archival papers at the Florida State Archive in Tallahassee. I reviewed criminal justice related materials in subject files, legal files, bill files, legislative affairs files, press files, issue correspondence files, and files on legislative committees and task forces for Governors in office between 1972 and 1995 (Askew [1971–1979], Graham [1979–1987], Martinez [1987–1991], Chiles [1991–1998]). From the communications, reports, news clippings, and memos therein, I identified areas of concern to the various administrations (death penalty abolition and prison overcrowding, for example) and within those identified important features and concepts (such as federal court decisions or prisoner dangerousness). These files also provided a window into the positions and responses of key actors, including the Florida Department of

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Corrections, a crucial player in LWOP's history, for which archival records are otherwise unavailable. I triangulated those materials with reports from two of Florida's largest newspapers, the *St. Petersburg Times* (now the *Tampa Bay Times*) and the *Miami Herald*; publications of the Florida Department of Corrections, including annual reports and the newsletter *Correctional Compass*; and information on capital punishment in Florida obtained at the National Death Penalty Archive. With news stories as with archival materials, I researched life sentencing and related policy, including sentencing guidelines, prison overcrowding, and the death penalty. News stories in general fell in two categories, concerning either law cases or legislation and policy. My primary interest was the latter.

The second line of research focused on the specific laws that altered life sentencing in Florida. The *History of Legislation*, an inventory of all bills (successful and unsuccessful) by year and category, provided a detailed overview. I supplemented this with a digital database search for laws and session laws involving life sentencing. For pertinent laws, I studied bill summaries, staff analyses, and legislative journal entries and committee files, again noting areas of concern, actors' positions on the issues, and related justifications and assumptions. I kept a chronological list of happenings, which included bills (successful and unsuccessful), hearings, special legislative sessions, reports, and significant actions by the Florida Supreme Court.

For the most critical bills, I looked beyond the paper trail and listened to audio recordings of legislative committee meetings and floor debates. Fortunately, Florida has audio-recorded many of these since 1969 and preserved them at the State Archive. For some proceedings, such as those of the House Select Committee on the Death Penalty of 1972, the recordings consist of many days. Here, too, I proceeded chronologically, listening to the recordings from committee onward. Overall, the files noted above amount to thousands of pages, and the audio recordings many dozens of hours. This allowed me to consider the development of state penal policy at the same time that I researched LWOP's role therein.

Throughout, the classification of information proceeded by a process of reading, extracting material, and detailed note taking. The extracted material was recorded, annotated, and organized under subject headings that I continuously revised. I began with categories of penal policy and practice (such as life sentencing, capital punishment, clemency, parole, or prison overcrowding) followed by subcategories pertaining to specific events and issues. Throughout, I cross-referenced archival materials with news stories and other evidence. On the rare occasion that a news account

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presented a claim different from the evidence in the archives, I took the following approach: if a statement reflected public opinion or the personal opinion of an interviewee, I favored the news story; if a statement concerned the law on the books or government actions, I relied on the archive. Bringing the lines of research together, topics started to form in the history of LWOP, and did so around particular moments in time: themes surfaced along with identifiable conjunctures in which the laws or practices affecting life without parole changed.

Even before arriving at the archives, detailed studies of Florida penal policy by Schoenfeld (2009, 2010, 2014), Miller (2012), and Griset (1996) acquainted me with some of the most important criminal justice concerns and related legislation. Schoenfeld's work on mass incarceration in Florida, in particular, provided a highly informative resource and touchstone for thinking about what distinguishes LWOP from broader penal trends and the study of LWOP from the study of mass incarceration writ large.

A History of LWOP in Critical Junctures and Forms

If today LWOP stands as a social fact, an identifiable entity in legal and penal discussions, human rights dialogues, and other forums, this was not always so. In Florida, sanctions or practices intent on holding people in prison forever did not appear in official conversation until the last third of the twentieth century. Like many Southern states, Florida lacked a centralized penal bureaucracy and a store of funds with which to build and maintain multiple prisons for much of the twentieth century. There was a central prison (Raiford), but the state relied heavily on convict leasing, road camps, chain gangs, and prison farms (Miller 2012; Schoenfeld 2014).

Imprisonment took hold in Florida with the Florida Department of Corrections (FLDOC). Created in 1957, the FLDOC came into its own in the 1960s thanks in large part to Secretary Louis Wainwright, who from his appointment in 1962 until stepping down in 1986 transformed the FLDOC, in image and practice, into a standardized bureaucracy where professionalization, rehabilitation, and safety went hand in hand (Schoenfeld 2009). Under Wainwright's administration, the state's rehabilitative moment peaked in the 1970s even as the indeterminate sentencing model and the idea of rehabilitation were nationally under siege (Schoenfeld 2014).

A number of factors, however, threatened designs for a limited and orderly prison focused on treatment and reintegration. The FLDOC's aim to professionalize and modernize conflicted

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with pre-existing interests in decentralized work camps (Schoenfeld 2009: 116–17). Prison capacity remained limited and political conflicts slowed resource allocation (Schoenfeld 2009, 2014). Florida's increasing index crime rate led the South, fueling prison admissions (Florida Department of Corrections (FLDOC) Annual Reports 1970–1972, 1974–1975). Consequently, despite the FLDOC's aims, overcrowding and dangerous working and living conditions persisted (Schoenfeld 2009). In 1971, race riots erupted at Raiford (Ohmart and Bradley 1972). In 1972, a life-sentenced prisoner filed a prison conditions lawsuit resulting in federal oversight of Florida prisons until 1992 (Schoenfeld 2010).

Overcrowding and the FLDOC's orientation converged to keep time served to a minimum. Life-sentenced prisoners—more than a thousand admitted between 1957 and 1972 (FLDOC Biannual Reports; see Florida Department of Offender Rehabilitation 1977)—served on average less than 10 years (Ehrhardt et al. 1973) and were immediately eligible for parole release (Powers 1972). This was the backdrop for Florida's first serious consideration of life sentencing *without parole*.

The history of LWOP in Florida between 1972 and 1995 comprises a series of four critical junctures. These are roughly chronological in order, but the primary basis of division is that different processes generated LWOP at each juncture. The first two processes—concerning Florida's response to *Furman* (*displaced death penalties*) and the 1983 sentencing guidelines reform that abolished parole (*parole residue*)—set the groundwork for LWOP in Florida. Those processes in turn conditioned LWOP's intersection with the punitive turn (*promises*, *rising tide*) and the eventual adoption of LWOP as the capital sentencing alternative (*leveling up*).

Displaced Death Penalties

The death-penalty-as-driver account predicts an urgent rush to fill the gap left by *Furman* through the enactment of statutes authorizing LWOP as a punishment for capital crimes. What happened in Florida, however, was rather different. LWOP gained immediate attention, but no laws with LWOP went into effect. The Florida case diverges there from the conventional wisdom. Yet it reveals *other* ways in which temporary abolition of the death penalty forged LWOP.

LWOP and the Post-Furman Agenda

Life without parole's place in American criminal justice at the start of the 1970s was limited. It played no part in the litigation

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that culminated in *Furman* (Meltsner 1974). It had never been the law in Florida. Yet LWOP held a prominent place on Florida's post-*Furman* agenda for several reasons. First, Democrat Governor Reubin Askew, a strong critic of the manner in which capital punishment was applied (Dyckman 1972), recognized the value of LWOP as a capital sentencing alternative. Upon taking office in 1971 with *Furman* pending, Askew declared he would sign no death warrants, effectively joining a national moratorium on executions (Dyckman 1972). After *Furman*, Askew quickly appointed a commission to study capital punishment (Ehrhardt and Levinson 1973) and the legislature followed suit. In July 1972, the House Select Committee on the Death Penalty announced a schedule of meetings and public hearings, listing three "significant questions which must be answered" (Gautier 1972):

1. By what constitutional procedure may the death penalty be imposed?
2. To what crimes should the death penalty be applicable?
3. Is life imprisonment without parole desirable from the viewpoint of the burden and danger placed upon correctional personnel?

The second reason that LWOP was on Florida's post-*Furman* agenda had to do with the state's Attorney General. Taking a pioneering view at the time, Robert Shevin lobbied for LWOP as part of a general strategy promoting mandatory minimums and sentencing, in less technical terms, that meant what it said. In 1967, as a state senator, Shevin unsuccessfully introduced a bill calling for a 20-year mandatory minimum on life sentences. Before the legislature in 1972, he earned lawmakers' attention with similar talk, proposing LWOP not only as a capital alternative but as the rule for all life sentences: "society ought to be able to expect that a life term means substantially life," he said, "and if you're not going to say for the rest of his natural life then you ought to put some limitation on when he can be eligible for parole" (Robert Shevin, House Select Committee, October 12, 1972: see Shevin 1975: 4). Shevin advocated reinstating capital punishment as a mandatory penalty limited to seven forms of aggravated, premeditated homicide. Aware this would exclude certain crimes that were death-eligible prior to *Furman*, including some homicides and rape, he urged those crimes receive mandatory "*life imprisonment without parole*" (Shevin 1972, emphasis in original).

As Shevin well expected, his position was countered by the third reason LWOP featured on Florida's post-*Furman* agenda: FLDOC opposition. FLDOC organizing against LWOP began before *Furman*, in 1971, when Askew introduced and the legislature passed a law stating that in the event of abolition death-

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sentenced prisoners would be resentenced to LWOP (Charles Musgrove, Public Defender, House Select Committee, September 29, 1972; Ehrhardt and Levinson 1973). That law never went into effect. The Florida Supreme Court, influenced by the FLDOC's stance (Harvey 2015), moved first and resentenced the state's death row prisoners to life *with* parole (*Anderson v. State* 1972; *In re Baker* 1972). After *Furman*, FLDOC opposition persisted, coming to a head in Secretary Wainwright's message to the House Select Committee on behalf of the FLDOC. Nominally supportive of capital punishment, the agency "unanimous[ly] oppos[ed]" LWOP for the reasons that historically limited its use—space was precious and carrots for reform necessary for prison order (Wainwright 1972: 2–3):

> If you will mentally place yourself in the place of one of these offenders, I think you can visualize their feelings of despair. When the law allows a judge to sentence a human being to life imprisonment without parole, he actually loads the gun and cocks it, the discharge will come sooner or later. This discharge or adjustment to their situation and environment could be massive escapes, assaulting or killing personnel or other inmates, taking hostages, or general chaos in our prison system.

Corrections ideology, too, played a role. Per Wainwright, it was a "fact [] recognized by each and every agent of this system" that "all the offenders need help in order to develop different values, personalities and attitudes toward their environment" (1972: 2). "[I]t would be wrong," he argued, "to enact a law that would make self-motivation for lifers impossible, and would exclude them from institutional programs of rehabilitation," in effect "subject[ing] [them] to wholesale 'warehousing' of human beings" (1972: 3). The "ultimate end of the no-parole law," Wainwright portended, would be "the end of Death Row and the establishment of 'LIFE ROW'" (1972: 6, emphasis in original).

These competing positions came to the fore during public hearings and legislative debates in the summer and fall of 1972 (Florida House Select Committee on the Death Penalty 1972a). Testimony from prison guards and prisoners, who feared for their safety, proved especially influential. As one guard stated, if LWOP replaced the death penalty, "I think I would have to give [my job] up…I'm afraid my life would be in danger" (Florida House Select Committee on the Death Penalty 1972b: 127). Some prisoners felt the same way (Florida House Select Committee on the Death Penalty 1972b: 69). Their pleas convinced many

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legislators (House Select Committee, August 31 and October 27, 1972; see Ehrhardt and Levinson 1973: 20–21), who voted not to include LWOP in the death penalty replacement bill (1972 HB 1A). Instead, a life sentence with parole eligibility after 25 years was the new alternative sanction (Fla. Laws Ch. 72–724). The FLDOC's influential role adds an important new character to the story of *Furman* and LWOP. In Florida, the strongest and most influential arguments against LWOP after *Furman* came from prison administrators, prisoners, and prison staff.

Rethinking Furman's Impact on LWOP

According to the standard narrative, *Furman* provoked an immediate rush to LWOP in capital statutes. By contrast, in the "mad dash" (Gottschalk 2006: 218) to rewrite Florida's capital statute after *Furman*, LWOP was considered, but not implemented. Nevertheless, the discussions, debates, and reorganization of the criminal code in response to *Furman* set the course for LWOP in significant ways.

First, because Florida lawmakers interpreted *Furman* to require a narrowed application of the death penalty, certain crimes punishable by death under pre-*Furman* law were displaced from the capital context. Most of those crimes (kidnapping, rape, and certain war and terrorism crimes) landed in a new legal category—the "life felony," less serious than a capital felony but more serious than a felony of the first degree (Fla. Laws Ch. 72–724; Ehrhardt and Levinson 1973: 11, 20). This displacement downgraded the punishment for some serious offenses from death, while recognizing their unique gravity (Staff Analyst, House Select Committee, November 27, 1972). The punishment for a life felony was a mandatory minimum of 30 years, stiffer than the prior penalty of "life," which amounted on average to parole release after 10 years (Ehrhardt et al. 1973). Within the decade, however, LWOP would become a discretionary punishment for life felonies, and since then prisoners convicted of these formerly capital crimes have comprised a substantial share of Florida's LWOP population. Between 1983 and 1995, for example, more than 20 percent of the prisoners admitted on LWOP were convicted of kidnapping or rape (Florida Department of Corrections 2016).[3] Over time, the scope of life felonies, now punishable by LWOP, has gradually expanded.[4]

[3] One traces a similar process in Louisiana, which responded to *Furman* by redefining murder into first and second-degree categories. The penalty for the former remained death or life imprisonment; the penalty for the latter was life with a 20-year mandatory minimum. The minimum was raised to 40 years in 1975, and to mandatory life without parole in 1979 (Wikberg 1979).

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The response to *Furman* also laid a foundation for LWOP in a second way. It opened a space for conversation about mandatory minimum sentences, limits on judicial and administrative discretion, and truth in sentencing that would soon undergird the abolition of parole for noncapital cases and, subsequently, the punitive policies associated with mass incarceration. The question of whether to reinstate the death penalty focused attention on life sentencing practices, revealing that the punishment often amounted to far less than natural life. Such revelations aligned with a growing public anxiety about the gap between sentence lengths and time served (compare Stuntz 2011). Once a core feature of the open-ended indeterminate sentencing paradigm, the life sentence was recast in this context as a sanction that, to be "true," must mean what it said. As Representative Hazleton put it, "Up to this point, the public has expected. . .that if someone commits an extremely heinous crime. . .that individual would be put to death. If that individual is not put to death. . .I think the public expects that the individual who is given life serves life" (House Select Committee, October 12, 1972; see Shevin 1975).

Because the FLDOC strenuously opposed LWOP, conversation turned to other ways of restricting release for prisoners convicted of serious noncapital crimes. Suggestions included mandatory minimums (House Select Committee, August 25, August 31, September 29, and October 12, 1972) and limiting "the discretion that we grant the judiciary" (House Select Committee, October 27, 1972). Such conversations merged with pre-existing, broader interests in mandatory minimums and limited discretion. One congressman asked, "would it serve the ends of criminal justice if we made sentences mandatory then in every other case[?]" (House Select Committee, September 29, 1972; see House Select Committee, October 27, 1972, discussing a noncapital bill proposing mandatory minimums). *Furman* destabilized more than death penalty terrain. Discussions of secure sentencing alternatives drew attention to a general issue of penal paradigms that over the next decade would brew to a crisis point.

Parole Residue

The punishment for life sentences under Florida's revised death penalty statute—a mandatory 25 years before review for

[4] One non-homicide crime, sexual battery of a minor, remained a capital felony after *Furman* (Fla. Laws Ch. 72–724). The classification, however, is largely symbolic. While the United States Supreme Court declined to reach the provision when it upheld Florida's post-*Furman* law in *Proffitt*, the Court's precedent holds the death penalty unconstitutional for non-homicide offenses (*Coker v. Georgia* 1977; *Kennedy v. Louisiana* 2008). This too, in effect, is a displaced formerly death-eligible crime for which the punishment is now LWOP (Fla. Laws Ch. 95–294).

parole—would stand for more than 20 years. Prisoners life-sentenced on noncapital crimes, however, witnessed substantial changes during that period, in shifts not always plain to see. Most significant was The Correctional Reform Act of 1983, a sentencing guidelines reform that occurred prior to the tough-on-crime era. The following section presents the motivations for the 1983 reform and introduces the principal legal changes as they relate to life sentencing, including the abolition of parole for noncapital offenses; the subsequent section articulates the effect of those changes, in concert with administrative rules and clemency practices, on life sentences.

Consistency and Fairness Reform

In the late 1970s, Florida prisoners serving life sentences for noncapital crimes had several ways to obtain release: parole review after a minimum of time served; mandatory clemency review after 10 years with a clean disciplinary record (Fla. Stat. 944.30); and "gain time," Florida's version of what many states call "good time," an administrative release program based on time credits, allowing prisoners to accrue days off the sentence for every month without a disciplinary incident. In the late 1970s, nearly 300 life-sentenced prisoners were released annually to some form of community supervision, roughly equaling the number of admissions (FLDOC Annual Reports 1973–1979). This confluence of admission and release comported with the FLDOC philosophy at the time, which stressed an opportunity for all prisoners to demonstrate the ability to live in society.

As the 1970s turned to the 1980s, however, indeterminate sentencing and parole came under attack from liberal and conservative viewpoints (Garland 2001). In Florida, too, there was a growing "distaste for [the] fundamental thesis of the indeterminate philosophy that postconviction officials should have power over time served" (Griset 1996: 129). A news editorial explained what the public saw as a dysfunctional interplay between different arms of the criminal justice system (*Miami Herald* 1983):

> Florida's criminal justice system has been playing a deceptive game with sentencing. Judges would send convicted criminals to prison for long terms, but the parole system would turn them loose.…The severe sentences were often for show—to placate crime victims and to woo voters in the next election by demonstrating a 'get tough on crime' attitude. In other instances, however, judges became so concerned at the brevity of the terms actually served that they retained jurisdiction in order to prevent a prisoner's early release. The overall result has been a crazy-quilt pattern of sentencing and actual time

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> served that bears no rational relationship to the crimes being punished. . .a sham.

As the public demanded "truth" (Boehm 1983), criminal justice actors were also concerned with the impact of sentencing and parole practices on prison overcrowding. The Parole and Probation Commission had long been under scrutiny (Florida House Committee on Corrections, Probation, and Parole 1983a). If the public perceived parole as too soft, some state officials worried the Commission was not releasing prisoners expeditiously enough to withstand increasing prison admissions (Clifton 1983). Interest in curbing judicial discretion was also ongoing. What began with a court-appointed commission to study sentencing guidelines in the mid-1970s (Griset 1996: 130–31) culminated with a 1983 report by the Governor's Corrections Overcrowding Task Force. Aiming to decrease the number of prisoners, the Task Force preferred alternatives to incarceration and restrictions on system-actor discretion over statutory increases in sentence lengths or spending on new facilities (Florida Corrections Overcrowding Task Force 1983). Among the Task Force's most substantial proposals were to implement sentencing guidelines and abolish parole. The legislature adopted both. In the resulting law, the Parole Commission was given a sunset date, and parole eliminated for all noncapital crimes after October 1, 1983 (Fla. Laws Ch. 83–87, Fla. Laws Ch. 83–131). The new law did not apply to capital felonies, however, for which the sentence remained death or life with parole eligibility after 25 years.

In the process, legislators took direct action on arbitrariness in life felony cases. As a former Chief Justice of the Florida Supreme Court pointed out, lifers with comparable crimes and backgrounds served disparate time: "[W]here people show up at Raiford [State Prison] for life crimes, they are similarly situated in terms of past criminal history, one's doing five and one's doing twenty… That's what guidelines are aimed at" (Alan Sundberg, House Committee on Criminal Justice on PCB6, May 16, 1983). In addition, an acting Justice explained, because judges could retain power over release for up to one-third of a prisoner's sentence, some were in the practice of "imposing 700 or 800 year sentences" for life felonies to "in effect … act as a parole board" (Parker MacDonald, House Committee on Criminal Justice on PCB6, May 16, 1983). The consequences were potentially fatal: as one legislator exclaimed, with a 700-year sentence "[the prisoner] won't ever make it" (Representative Martinez, House Committee on Criminal Justice on PCB6, May 16, 1983). To curb extreme sentencing, the new law imposed a 40-year maximum on terms-of-years sentences for life felonies (Fla. Laws Ch. 83–87).

The change to the life felony law reflects the overall aim of the 1983 reform. For neither the public nor state officials was the chief concern that sentences were not long enough. Rather, different arms of the system worked at cross-purposes. Sentences were arbitrary, sentencing and release practices inconsistent. Restricting discretion and abolishing parole, it was thought, could cure this. In the process, the reform would "mak[e] the system less complex so the person on the street can understand" (Jim Eaton, House Committee on Criminal Justice on PCB6, May 16, 1983).

Residue of a Paradigm Shift

The reality of the reform for life-sentenced prisoners, however, was that the new changes in release practices put them in a uniquely unfavorable position. Legislators understood that implementing guidelines and abolishing parole could aggravate the overcrowding problem (Doig 1982). Accordingly, abolishing parole was viable only if another release mechanism compensated (Florida House Committee on Corrections, Probation, and Parole 1983b). Expanding gain time filled this critical role. As a bill analysis explained, "[R]evisions in the schedule of gain time allowances will make substantial changes in the time served by inmates irrespective of the fact that parole eligibility may be eliminated for offenders sentenced after the effective date of the guidelines" (Florida Senate 1983; see Fla. Laws Ch. 83–131).

An administrative regulation (Fla. Admin. Code 33-11.045[2][f] [eff. 1980]), however, precluded prisoners not sentenced to terms of years (i.e., death-sentenced or life-sentenced prisoners) from accruing gain time unless the Governor first commuted the sentence. While the Task Force recommended allowing life-sentenced prisoners to earn gain time without commutation (*Miami Herald* 1982), no such provision surfaced in the law. Instead, parole abolition and the gain-time restriction together had the effect of limiting lifers' release possibility to clemency (Florida House Committee on Criminal Justice 1983). The Parole Commission voiced doubts about placing the responsibility for life-sentenced prisoners solely with the Governor, noting the Commission itself was created because the executive was overwhelmed with clemency applications, but the matter received little discussion (Nancy Wilson, Parole and Probation Commission, Senate Committee on Corrections, Probation and Parole, on SB644, April 26 and May 4, 1983; see House Committee on Criminal Justice on PCB6, May 16, 1983; House Floor on SB1140, May 27, 1983).

In the following years, synergy between the gain time restriction and parole abolition worked a significant split in the

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treatment of life-sentenced and long-term prisoners. On the one hand, gain time provisions led to an overall shortening of sentence lengths, which for long-term prisoners more than offset the impact of parole abolition (Griset 1996). On the other hand, clemency was disappearing as a meaningful route of review. The long-standing statutory mechanism (Fla. Stat. 944.30; Fla. Laws Ch. 57–121) requiring that the FLDOC recommend, and the Governor review, sentences of life prisoners who had served 10 years on good behavior was not in regular operation. As a FLDOC memorandum in early 1983 evinced: "It has been some time since we evaluated the inmates under the provision of Florida Statute 944.30.... Your staff should become familiar with this statute" (Jones 1983). More, the statutory mechanism was soon dissolved. A 1986 amendment made the recommendation discretionary and excluded capital life-sentenced felons, and in 1988 the legislature repealed the statute altogether (Fla. Laws Ch. 88–122; see *Dugger v. Williams* 1991). Over the course of his tenure, Governor Bob Graham became increasingly uncomfortable with commutation (Von Drehle 1995: 192). As clemency withered for noncapital lifers, so did any reasonable possibility of release.

Did Florida legislators see the unique bind into which they put noncapital life-sentenced prisoners? The legislative record suggests not. Certainly, many legislators supported strong punishment for violent crime and reserving prison space for serious and violent offenders (see House Committee on Corrections, Probation, and Parole on HB1012, May 3, 1983), but it was not the principal aim of the 1983 reform to increase existing punishments or preclude release. Rather, expanded gain time provisions were meant to offset the sentence-lengthening impact of parole abolition (Griset 1996), and limiting terms-of-years sentences for life felonies to maintain a possibility of release for lifers (Fla. Laws Ch. 83–87). The better explanation is that the legislature, in the midst of a vast system overhaul, did not carefully contemplate the logistics or future of clemency or the impact this could have on life-sentenced prisoners. In 1983, the decline of clemency was by no means a sure thing—indeed, a statutory mechanism in place since 1957 called for executive review.

Michael Tonry (2016) notes that some surprising, even shocking, elements of mass incarceration policy are fairly characterized as "residue" of indeterminate sentencing. They are elements that emerged during the shift from indeterminate sentencing, often without receiving any direct attention (Tonry 2016: 28). The manner in which release for life sentences was redefined by a synergy of parole abolition, gain time restrictions, and clemency practice ought to be recognized as one of these residues. Sentencing guidelines, parole abolition, and gain time tend to dominate

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talk about the 1983 reforms. Less discussed is the uniquely severe treatment this precipitated for noncapital life-sentenced prisoners. Yet the impact has been substantial. Since October 1983, thousands of Florida prisoners convicted of noncapital crimes have been sentenced to life (Florida Department of Corrections 2016). The 1983 reform was at once Florida's most substantial move toward LWOP and its most understated.

Promises and Rising Tide: LWOP and the Punitive Turn

Commentators tend to portray LWOP laws as declarations by legislators or governors intent on showing themselves tough on crime. Such intentional and expressive acts of legislation came indeed to Florida in the late 1980s and early 1990s, but not always in the manner the conventional wisdom associates with "LWOP laws." On the one hand, consistent with the conventional wisdom, LWOP did begin to appear in laws explicitly articulating life imprisonment "without parole" as the sanction. A 1989 law made this the penalty for first-degree murder of a law enforcement officer (Fla. Laws Ch. 89–100). A 1990 law provided it for trafficking large amounts of cocaine (Fla. Laws Ch. 90–112). The first part of this section discusses how the 1983 reforms set in play circumstances that led to the use of LWOP as a political tool.

Simultaneously, however, LWOP took a second and less explicit posture, expanding in statutes that increased punishments broadly across felony categories. Rather than wield LWOP as a demonstrative tool or effective device, these broader statutes raised sentencing across the board, implicating life sentences without singling them out. Here, too, the synergy of parole abolition, gain time restrictions, and clemency practice prompted by the 1983 reform situated prisoners whose sentences were upgraded to life in a distinctly poor circumstance. The second part of this section discusses how LWOP rose in such laws, so to speak, with the tide.

Promises

When Republican Governor Bob Martinez took office in 1987, Richard Dugger simultaneously replaced Louis Wainwright as Secretary of FLDOC. Both stepped squarely into a long-brewing corrections crisis. The state's violent crime rate was approaching an all-time high, rising faster than national and regional rates (FLDOC Annual Report 1988–1989). Longtime fears over career criminals joined new concerns with trafficking and crack cocaine (Schoenfeld 2009). Prison admissions were peaking, having increased by more than 405 percent since 1981 (FLDOC Annual Report 1989–1990). For the first time since the

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1930s, a majority of the Florida prison population was black (FLDOC Annual Report 1989–1990: 31). Meanwhile, the overcrowding crisis remained. The revolving-door problem parole abolition sought to resolve was resituated and rejuvenated in gain time (Griset 1996). With prisons consistently over capacity, and as administrative release provisions appeared less functional (Martinez 1987), expansion appeared more attractive and necessary (Schoenfeld 2010: 219).

In this context, in November 1988, Charles Street, a repeat offender sentenced to 15 years for attempted homicide, and selected for early release by a computer-generated algorithm, killed two Dade County law enforcement officers in a drug-related confrontation (*Miami Herald* 1988). The incident quickly became a prism for long-standing complaints. Governor Martinez demanded to know "if prisons were soft on Street" (May 1988). The media criticized "the idiocy of stuffing prisons and then blindly releasing those who won't fit" (*St. Petersburg Times* 1989). For the legislature, the Street case "demonstrate[d] a lot of the problems that are wrong with the criminal justice system" (House Committee on Criminal Justice on HB25, February 8, 1989) and set the agenda, sparking a legislative commitment to increase punishment and send a message—a "philosophy … of stressing the punishment side" (Representative Silver, House Floor on HB25, May 25, 1989).

This was the context for the first Florida statute explicitly calling for life imprisonment "without parole." The Law Enforcement Protection Act of 1989 provided that "for first degree murder, when the death penalty is not imposed, life imprisonment would happen, without parole and without the possibility of release." Law enforcement and citizen groups (such as Support Cops on Toughening Time [SCOTT]) had lobbied unsuccessfully for such an exception to the capital statute since 1972 (House Floor on HB25, May 25, 1989). The prism of the Street case pushed it through. The statutory exception authorized LWOP as an alternative punishment for *a single* type of capital crime. As before, the alternative sentence for all other types of capital murder remained life with eligibility for parole after 25 years. The exception was quickly extended to cases in which judges and judicial staff were victims (Fla. Laws Ch. 90-77).

LWOP appeared explicitly for a second time in The Trafficking in Controlled Substances Act of 1990. Governor Martinez introduced the mandatory drug bill personally, originally advocating the death penalty for certain quantities. Legislators prudently recognized that capital punishment would be unconstitutional for a drug offense. Respecting the Governor's public pronouncement, however, the drafting committee included

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"life without the possibility of parole" (Representative Silver, House Criminal Justice Committee on HB2963, April 26, 1990). Trafficking in 150 kilos of cocaine or more, formerly punishable by up to 25 years, would now receive mandatory LWOP. Given that noncapital life sentences in Florida already lacked parole, the terms "without parole" in this statute were technically superfluous. The words, however, served the immediate functions of memorializing victims and promising that a life sentence would mean what it said.

These statutory promises, using LWOP as a distinct tool for a defined penal aim, highlight LWOP's emergence as a concept at hand for populist thinking about sentencing policy in the late 1980s and early 1990s. It is important to emphasize, however, that the arguments in legislative debates giving rise to these promises were no more about criminal subjects than about administrative crises and ineffective responses. The cycle that began with parole abolition in 1983, followed in succeeding years by one adjustment to gain time after another, combined with the Street case's illustration of those failures to generate a circumstance in which a promise of life "without parole" was functional as a tool of public reassurance. Questions over the true meaning of laws and practices, and doubts about what institutional actors might do, collided with high profile events to fuel already existing public safety concerns. The public demanded reassurance of protection from dangerous people, certainly, but also of a rational criminal justice system. In this regard, explicit LWOP laws, these largely symbolic affairs, were a natural outgrowth of the state's efforts with sentencing guidelines and parole abolition gone awry.

Rising Tide

Laws explicitly authorizing life "without parole" were not the only form in which LWOP expanded in punitive policy. As Florida entered the late 1980s and 1990s, with ineffective policy responses feeding serial reforms, a tightening balance of power in the state legislature raised the political stakes (Schoenfeld 2009). The environment rewarded "governing through crime" (Simon 2007) and also promoted "competing toughness" (Lynch 2010: 158). The result was a series of large-scale criminal justice reforms in which LWOP was rarely a focal point, but increased in scope with each successive move. Amidst these struggles, LWOP expanded in less express ways.

Florida's 1988 habitual offender law (Fla. Laws Ch. 83–131) was motivated in significant part by state prosecutors' objections to the 1983 sentencing guidelines. Prosecutors argued the guidelines demanded too many priors before prison and sentencing

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ranges were too low (Senate Judiciary Committee on SB307, April 14, 1988), and lobbied for sentencing of serious and violent repeat offenses outside the guidelines (Griset 1996). Capitulating to the prosecutor lobby, the 1988 habitual offender law moved more than 40 percent of criminal cases outside the guidelines and authorized prosecutors to seek mandatory sentences (including life sentences) for a much wider range of conduct (Griset 1996). Within the guidelines, mandatory sentencing enhancements served a similar purpose by reclassifying sentences up a notch if certain facts were established (e.g., Fla. Laws Ch. 89–157, firearm taken from law enforcement; Fla. Laws Ch. 90–207, gang activity). Like the 1988 habitual offender law, sentencing enhancements applied across felony categories, including upgrades to life felonies and terms of years "not exceeding life."

Within five years, an "unmistakable pattern" of intense racial disparity was evident; a disproportionate number of the prisoners sentenced under the habitual offender law, primarily for nonviolent crimes, were black (Florida Joint Legislative Management Committee 1992). Democrat Governor Lawton Chiles and like-minded legislators entered the 1993 legislative session seeking to "completely revamp" criminal justice (Representative Logan, House Criminal Justice Committee on HB79, February 15, 1993) and retake the reins (Representative Martinez, House Floor on HB79, March 2, 1993). The resulting law (Fla. Laws Ch. 93–406) collapsed the 1988 habitual offender law, many mandatory sentencing statutes, and the broad prosecutorial discretion that went with them back into the guidelines. Sheriffs and states attorneys dubbed the law a "criminal relief act" (Representative Hanson, House Floor on HB79, March 2, 1993). Yet their interests were partially vindicated in accompanying legislation that authorized life sentences for aggravated carjacking and home invasion robbery (Fla. Laws Ch. 93–212).

Two years later, as the legislative tug of war continued, life sentences continued to expand. Conservative legislators proposed a law package to "take[] us back to where we were in 1993" (Representative Burt, Senate Floor on SB172, April 27, 1995). This included a fourth-strike law (Fla. Laws Ch. 95–182) that, in the mold of the promises discussed above, explicitly authorized a mandatory "life sentence of imprisonment without the possibility of parole" for a narrow group of career criminals (Senate Criminal Justice Committee on SB168, January 24, 1995). By contrast, another reform bill (Fla. Laws Ch. 95–184) fit the mold of sentencing enhancements and the 1988 habitual offender law. It increased sentence points under the guidelines for 40 different felonies. This was broad legislation in which life sentencing was implicated at the upper end but by no means central and barely

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discussed (Senate Floor on SB172, April 27, 1995). Nevertheless, as sentence lengths increased across the board, the scope of noncapital LWOP sentences rose as well.

Leveling Up: LWOP as a Death Penalty Alternative

In 1994, more than 20 years after *Furman*, Florida eventually turned to LWOP as an alternative sanction for all capital murder. Conventional wisdom credits the anti-death-penalty movement with driving the adoption of LWOP in capital statutes following reinstatement. In Florida, however, efforts to implement LWOP as a death penalty alternative in the late 1980s and early 1990s were not pivotally advanced by abolitionist strategies. Instead, what ultimately ushered in LWOP was unevenness between sentences for lifers in Florida's capital and noncapital law. The move could be described as a *leveling up*, intended to bring life sentencing in capital cases into line with life sentencing in all other circumstances.

Under Florida's post-*Furman* death penalty law, prisoners life-sentenced for capital crimes (other than those subject to the exception for murder of a law enforcement or judicial officer) were parole-eligible after 25 years. The 1983 reform abolished parole for noncapital life sentences, but did not affect sentences for capital crimes. As one legislator explained, in support of a bill addressing the issue in 1989, there was an "inequity" and "anomaly" in the law (House Criminal Justice Subcommittee on Prosecution and Punishment on HB356, April 11, 1989). The bill's Senate sponsor wrote the Governor's general counsel to emphasize the loophole's perverse effect: "our courts are facing a number of situations in which defendants are actually 'pleading up' in order to gain parole" (Thurman 1989). When the 1989 bill passed the legislature, Governor Martinez's legal team's recommended he "sign the bill into law without ceremony" (Office of the Governor 1989) to quietly fix the anomaly. The Governor vetoed, however, noting he was "extremely concerned about the effect this bill would have upon the application of capital punishment in Florida" (Martinez 1989). Martinez was also concerned with a less publicized aspect: the bill authorized parole for noncapital life-sentenced prisoners after 25 years (Martinez 1989). At root, the veto was a political gesture. As the *St. Petersburg Times* put it, "the life without parole alternative is not likely to be adopted anytime soon. There is too much political opportunism in the death penalty" (Dyckman 1990). A similar bill failed the following year (1991 HB 1175).

In 1994, two conservative members of the House, both death penalty proponents, sponsored a bill proposing LWOP as the

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alternative for capital murder that broke the stalemate (Dyckman 1994). "We've been advocating that for a long time," Attorney General Bob Butterworth stated, noting victims' families most wanted assurance the perpetrator would "never come out" (Dyckman 1994). The FLDOC expressed logistical concerns but did not oppose the bill (Florida Senate Committee on Corrections, Probation and Parole, on SB158, February 23, 1994). The bill passed with little press (Fla. Laws Ch. 94–228), and Governor Chiles did not veto. Once a hot button topic, LWOP was now a blip: "With little fanfare, the Legislature this year evidently ended parole for first degree murder" (*Miami Herald* 1994). The following year, the statute was amended to authorize LWOP for the remaining capital felony, sexual battery of a child (Fla. Laws Ch. 95–294).

Passing LWOP into capital punishment law in 1994, the legislative majority neither capitulated to abolitionists nor directly contravened the interests of death penalty proponents who preferred life to LWOP as an alternative sentence (see Harvard Law Review 2006). Rather than take sides in death penalty politics, and independent of debates over the severity or efficacy of the death penalty, legislators were swayed by activity outside the capital context. The indirect effects of the post-*Furman* statute and the synergy that generated LWOP from the 1983 reform set the conditions for LWOP's adoption as a death penalty alternative in Florida. As the scope of noncapital LWOP sentencing widened, the lack of LWOP in capital cases was an increasingly inexplicable anomaly that eventually had to fall.

Discussion

For some time the prevailing narratives have offered two accounts of the rise of LWOP. One describes LWOP as a tool of reassurance for a defunct death penalty after *Furman* and a strategic tool for the anti-death-penalty movement after capital punishment's resurgence (Harvard Law Review 2006; Steiker and Steiker 2014). The other depicts LWOP as one element of a movement in penal policy to increase sentence lengths and time served, to punish harshly and incapacitate convincingly—an account in which LWOP laws are political devices, declarations by legislators or governors intent to show themselves tough on crime (Tonry 2016). Insofar as these avenues have grown upon similar social and political realities, and on occasion reinforce each other (Steiker and Steiker 2014), one might expect to find LWOP situated at the crux of the two. Depicting LWOP merely as a product of capital punishment and the punitive turn, however, risks

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mistaking present perceptions for the conditions and processes that brought LWOP about. The Florida case shows this.

The death-penalty-as-driver account and the punitive turn account do not in themselves explain the manner in which LWOP emerged and expanded in Florida between the 1970s and the 1990s. Certainly, anti-death-penalty movements and punitive politics played a part, but it would be wrong to give either a leading role in the first two decades of LWOP's development in Florida. The emergence is better captured by a different explanation.

If we assume that *Furman* spurred the enactment of new capital statutes with LWOP, Florida does not fit the model. Due substantially to FLDOC opposition, no capital law with LWOP took effect. More, LWOP was not adopted as an alternative capital sanction for all first-degree murder until 1994. *Furman* matters, however, in ways other than what the conventional narrative maintains. The narrowed scope of capital sentencing after *Furman* moved crimes that were not aggravated homicide out of the capital statute, generating new noncapital felonies and felony categories with life sentences. In ensuing years, sentences for those newly noncapital felonies were upgraded to LWOP, and the scope of crimes defined as life felonies gradually expanded. This displacement, which blossomed as LWOP years later, was *Furman*'s most material impact on LWOP in Florida.

The role of *Furman* in Florida largely was to change the conversation. *Furman* provoked discussions about the need for mandatory, non-parolable sentences and for limits on the discretion to release prisoners. When it came to light that in actuality lifers served 10 years on average, this intensified public frustration that sentence lengths did not mean what they said. Invalidation of the old death penalty schemes thus illuminated a disconnect between what the public thought was going on and what *was* going on with sentencing—precisely the sort of phenomenon William Stuntz (2011) deems critical to criminal justice pendulum swings. The post-*Furman* conversation that began with LWOP linked to a broader discussion about penal change. *Furman*, in short, spurred not new capital statutes with LWOP, but new areas for LWOP outside the capital context and a conversation in which LWOP would become a plausible solution to a new set of policy problems.

The second pivotal moment for LWOP in Florida was the 1983 reform, which replaced indeterminate sentencing with a structured guidelines scheme. In the process, it abolished parole and expanded administrative release mechanisms that relied on credits rather than review. Overall this reform, which sought consistent sentencing and efficient management of penal resources, resulted in a reduction in time served by prisoners convicted of serious offenses. While the reform also sought to curb

death-in-prison sentences, a complex interaction of parole abolition, gain time restrictions, and clemency restructuring and retrenchment combined to place lifers in a posture with no reasonable expectation of release. Here, too, LWOP arose as a secondary effect of major systemic change. Again, it emerged as an artifact of transition, precipitating from a shift that in this case involved a system-wide change in penal philosophy. On both counts—in response to *Furman* and in the sentencing guidelines reform—LWOP arose from changes to penal law and practice that broke open old habits. While not necessarily motivated by interests in punishing more, these shifts raised questions about the treatment of prisoners convicted of serious and violent crimes. In Florida, LWOP emerged from these significant upheavals in American punishment.

Those generative processes, in turn, created a foundation that would intersect in critical ways with later events, punitive policy, and death penalty politics. Over time, LWOP became used increasingly for noncapital crimes, to the point where two decades after *Furman* it was an ordinary sanction. During the late 1980s and early 1990s, the ramifications of the 1983 synergy of parole, gain time, and clemency that closed the door on release for lifers set in, as the scope of noncapital life sentences expanded in sweeping penal legislation (sentencing enhancements, habitual offender laws, additional guidelines reforms). The 1983 changes to parole and gain time further set the course for the appearance of explicit LWOP laws: the cycle of failed attempts at managing prison release was a key condition for the political viability of using LWOP for demonstrative effect. The ramifications of displacing former capital offenses into life-sentence offenses and life felonies also grew, as the penalty shifted to LWOP. All this growth in LWOP outside the capital context accentuated the illogical situation by which capital life-sentenced prisoners were parole eligible while lifers convicted of noncapital offenses were not, eventually propelling legislators to introduce LWOP as the alternative for all capital murder in 1994.

By looking closely at LWOP's historical development within the context of Florida's penal policy, this case study shows how LWOP emerged from the force of conversations, debates, and decisions that, responding to major transitions and transformations and translating them through local arrangements and conditions, built new frameworks of penal law. There are indications that the points of transition that mattered to LWOP in Florida also mattered elsewhere. Among Southern states, Louisiana's history evinces a similar amalgamation (Foster 1988; Nelson 2009; see Wikberg 1979). In the North, Pennsylvania does (Gottschalk 2015; Rowan and Kane 1991–92; see Yount 2004). Both states

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regenerated capital and noncapital statutes after *Furman*, creating new degrees of murder and other noncapital crimes for which LWOP would become the mandatory sentence. Both states had long-standing laws that restricted parole for lifers. The federal jurisdiction (Schmitt and Konfrst 2015) and Washington state (Blagg et al. 2015) also abolished parole across the board. Today, Florida, Louisiana, and Pennsylvania are leaders in the United States in LWOP population (Nellis 2017). They are also areas in which racial disparity in LWOP sentencing is pronounced.

With respect to state-level studies of American punishment (e.g., Campbell 2011; Lynch 2010; Perkinson 2010; Schoenfeld 2014), one would expect the South's political, historical, and cultural features to correlate positively with an extreme penalty such as LWOP, and one might expect Florida would fall in line. The delayed timing and disjointed course of LWOP's emergence in Florida, however, emphasizes how penal policies and practices also are mediated by sub-regional factors, including local histories and arrangements of penal instruments such as capital punishment or parole, and the character and autonomy of different state actors. The FLDOC, for instance, was dedicated to professionalization in the early 1970s, such that rehabilitation and avoiding overcrowding were paramount, and possessed the autonomy to act influentially on those interests.

More generally, the history of LWOP in Florida—born from reform uprooting the indeterminate sentencing model, in which life sentences were abruptly redefined—offers a pointed reminder that the United States' history with indeterminate sentencing is important for explaining the extreme incarceration growth that followed. The study suggests the continued need for attention to the transition away from indeterminate sentencing as a factor that is responsible for shaping and explaining variance in contemporary American penal policy (see Tonry 2016).

Further, it bears emphasis that while this study presents a more complex account than the death-penalty-as-driver and punitive turn narratives, the three need not be mutually exclusive. In Alabama, even as the state adopted LWOP as a capital alternative after *Furman*, processes defined here may have contemporaneously inspired LWOP in other laws; and the Florida history shows how LWOP is eventually implicated in the punitive turn, in multiple ways.

Marie Gottschalk points out that LWOP is a punishment that applies to many types of offenses and many types of prisoners: the "worst of the worst," juveniles, nonviolent repeat felony offenses, drug felonies—all of which carry their own social meaning and likely demand different strategies of reform (Gottschalk 2015). The case of LWOP in Florida shows how LWOP also varies

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in its patterns of emergence and its rationales. LWOP emerged as a new penal thing in a multiplicity of forms and generative processes. The apparatus reacted to large external shocks in a piecemeal, incremental manner in which penal devices and logics intersected in ways not necessarily planned. In the bric-a-brac nature of its construction, in the by turns explicit and unmentioned nature of its operation, it becomes clear that to speak of LWOP is not to speak of a single type of law or isolated penal practice, nor can one assume that LWOP was the result of any single politics, motive set or ideology.

Future state-level research can expand and refine knowledge of the diverse processes and interests that have produced LWOP, and will benefit by contemplating the punishment as a product of complex intersections. The most important consequence of this diversity in the Florida case is how a very severe punishment arose and then extended broadly, growing into an intentional tool of harsh punishment, from roots that were not so intentional and not so harsh. In *The Prison and the Gallows*, Gottschalk (2006) recognizes "how institutional capacity, especially state capacity to pursue mass imprisonment as public policy, was built up well before." The early history of LWOP in Florida shows, similarly, how the institutional infrastructure of LWOP, which now serves as severe punishment for a wide variety of Florida crimes, was born from efforts to fix something, somewhere else.

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Christopher Seeds *is a PhD Candidate in the Department of Sociology at New York University. He was formerly a Deputy Capital Defender with the New York State Capital Defender Office, a Staff Attorney at the Center for Capital Litigation in Columbia, South Carolina, and a Visiting Scholar with the Cornell Death Penalty Project. His dissertation concerns the emergence of life imprisonment without the possibility of parole in the United States.*

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